

FCC MAIL SECTION

Federal Communications Commission

DA 99-2453

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Before the
DISPATCHED BY Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 90-189
Table of Allotments,)	RM-6904
FM Broadcast Stations.)	RM-7114
(Farmington, Grass Valley, Jackson,)	RM-7186
Lindon, Placerville, and Fair Oaks,)	RM-7415
California, and Carson City and)	RM-7298
Sun Valley, Nevada))	
)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 27, 1999

Released: November 5, 1999

By the Chief, Allocations Branch:

1. The Commission has before it the Petition for Reconsideration filed by Gold Country Communications, Inc. ("Gold Country") directed to the Memorandum Opinion and Order in this proceeding, 11 FCC Rcd 2356 (1996). Nevada County Broadcasters, Inc. ("Nevada County") filed an Opposition to Petition for Reconsideration. Gold Country filed a Reply to Opposition to Petition for Reconsideration.¹ For the reasons discussed below, we are reversing our earlier action in the First Report and Order in this proceeding. In doing so, we will upgrade Station KNGT, Jackson, California, to specify operation on Channel 232B1. In order to accommodate this upgrade, we will modify the license of Station KNCO, Grass Valley, California, to specify operation on Channel 231A.

Background

2. The Notice of Proposed Rule Making and Orders to Show Cause in this proceeding set forth three separate Petitions for Rule Making which were either mutually exclusive or interrelated. 5 FCC Rcd 2137 (1990). The first Petition for Rule Making was filed by Denise Neubauer ("Neubauer") proposing the allotment of Channel 258A to Placerville, California, as a second local FM service (RM-7186). The second Petition for Rule Making was filed by Eric R. Hilding ("Hilding") proposing the allotment of Channel 232A to Farmington, California, as a first local service (RM-6904). In order to accommodate this allotment, Hilding also proposed the substitution of Channel 259A for Channel 232A at Jackson, California, and modification of the license of Station KNGT, Channel 232A, Jackson, to specify operation on Channel 259A. This proposed Channel 259A substitution at Jackson conflicted with the proposed Channel 258A allotment at Placerville. The third Petition for Rule Making was filed by Gold Country, licensee of Station KNGT, Channel 232A, Jackson, proposing the substitution of Channel 232B1 for Channel 232A at Jackson, and the modification its Station KNGT license to specify operation on Channel 232B1 (RM-7114). In order to accommodate that upgrade proposal, Gold Country proposed the

¹In addition, Gold Country filed a Petition for Leave to File Supplemental Petition and Supplemental Pleading. Nevada County filed an Opposition and Gold Country filed a Reply to that Opposition. As discussed below, the Supplemental Pleading raises a credible claim of significant interference to an existing service and we believe that the public interest requires that we consider the engineering merits of that allegation. Accordingly, we hereby grant the Gold Country Petition for Leave to File Supplemental Petition.

substitution of Channel 231A for Channel 232A at Grass Valley, California, and the modification of the license of Station KNCO, Channel 232A, Grass Valley, to specify operation on Channel 231A. The proposed Channel 232B1 upgrade at Jackson conflicted with the proposed Channel 232A allotment at Farmington.

3. In response to the Notice of Proposed Rule Making and Orders to Show Cause setting forth the three proposals in this proceeding, Nevada County, licensee of Station KNCO, Channel 232A, Grass Valley, filed a Response to Order to Show Cause and Petition for Rule Making. In that pleading, Nevada County proposed the substitution of Channel 232B1 for Channel 232A at Grass Valley and the modification of its Station KNCO license to specify operation on Channel 232B1. The proposed Channel 231B1 upgrade for Station KNCO conflicted with the proposed Channel 232B1 upgrade for Station KNGT in Jackson, and also required the substitution of Channel 259A for Channel 232A at Jackson, and the modification of the Station KNGT license to specify operation on Channel 259A. In addition, Nevada County proposed the allotment of Channel 232A to Linden, California, as a first local service (RM-7415). This proposal conflicted with proposed Channel 232A allotment at Farmington, and also required the substitution of Channel 259A for Channel 232A at Jackson.

4. The First Report and Order upgraded Station KNCO, Channel 232A, Grass Valley, California, to specify operation on Channel 232B1, and allotted Channel 232A to Farmington, California. 10 FCC Rcd 9938 (1995).² In order to accommodate this upgrade and new allotment, the First Report and Order also substituted Channel 259A for Channel 232A at Jackson, and modified the Station KNGT license to specify operation on Channel 259A.³

5. Gold Country filed a Petition for Reconsideration directed against the First Report and Order. However, Gold Country did not provide a proof of service as required by Section 1.47(g) of the Rules there was no indication whatsoever that the Petition for Reconsideration had been served on the other parties in the proceeding as specifically required by Section 1.106(f) of the Commission's Rules. For this reason, the Petition for Reconsideration was dismissed as procedurally defective.

6. In the Petition for Reconsideration directed against that dismissal, Gold Country contends that the basis for the dismissal was factually incorrect. Specifically, Gold Country states that on October 13, 1995, one day after it filed the Petition for Reconsideration, it served the other parties in the proceeding. Through "ministerial oversight," Gold Country states that it did not file the Certificate of Service with the Commission. As "corroboration," Gold Country submitted a billing slip dated by hand from its law firm indicating a postage charge for the October 13, 1995, mailing of the Petition for Reconsideration.

²In a Second Report and Order, we separately granted a Petition for Rule Making filed by Sapphire Broadcasting, Inc., licensee of Station KIZS, Channel 234C, Carson City, Nevada, which substituted Channel 234B1 for Channel 234C, reallocated Channel 234B1 to Fair Oaks, California, and modified the station KIZS license to specify operation on Channel 234B1. 11 FCC Rcd 8117 (1996). That action is now final.

³In the First Report and Order, we also denied the Nevada County proposal for a Channel 232A allotment at Linden, California. The proposed Channel 232A allotment at Linden did not comply with the minimum separation requirements in effect on the date it was filed. Specifically, it was filed after the October 29, 1989, effective date of the new separation requirements set forth in Section 73.207(b) of the Commission's Rules. See Amendment of Part 73 of the Rules to Provide for an Additional Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations, 4 FCC Rcd 6375 (1989). Nevada County did not seek reconsideration of that denial.

7. After careful consideration of this entire matter, we believe that the public interest requires that we consider the Gold Country Petition for Reconsideration and its Supplemental Petition. We remain unpersuaded that Gold Country complied with the service requirement of Section 1.106(f) of the Rules. Even though Gold Country may not have timely served the other parties with a copy of its Petition for Reconsideration, it did serve the parties with a copy of its Supplement to Petition for Reconsideration and its Reply to Opposition thereby alerting parties of the filing of its Petition for Reconsideration. A failure to comply with Sections 1.46(g) and 1.106(f) of the Rules has not delayed resolution of this proceeding and we believe that an issue of interference to Station KNCO should be considered on its merits. Nevertheless, we would like to make some observations concerning the service requirements set forth in Sections 1.47(g) and 1.106(f) of the Rules and the filing of the Petition for Reconsideration by Gold Country. First of all, the most probative evidence concerning whether or not Gold Country actually served the other parties in the proceeding would have been statements from these parties stating that they did, in fact, receive a copy of the Petition for Reconsideration soon after October 13, 1995. Gold Country did not provide such a statement from any party in the proceeding. Second, even though Section 1.47(g) of the Rules states that the proof of service does not affect the validity of the service, the failure of Gold Country to submit its Certificate of Service to the Commission through "ministerial oversight" does not represent the degree of diligence that we expect from parties in a rulemaking proceeding.⁴

8. In its initial Petition for Reconsideration, Gold Country argues that the First Report and Order accorded disparate treatment to the petitioners in this proceeding. Specifically, Gold Country states as follows:

"This disparate treatment, application of the amended rules for maximum transmitting power for FM stations to the losing petitioners and applications of the earlier existing rules to those whose petitions were granted is violative of the Administrative Procedure Act, and results in a denial of due process to the losing petitioners."

Thereafter, Gold Country filed its Supplemental Pleading to Petition for Reconsideration to "correct an oversight" regarding prohibited levels of interference to its Station KNGT as well as Station KCIV, Mt. Bullion, California. In regard to its Station KNGT, the operation on Channel 259A will result in new interference from super-power Station KFRC-FM, Channel 259B, San Francisco, California. Specifically, Gold Country contends that a Station KNGT operation on Channel 259A would experience prohibited interference from Station KFRC-FM in an area of 1,107 square kilometers containing 25,138 persons. In addition, Gold Country contends that Station KNGT on Channel 259A would be short-spaced to Station KCIV, Channel 260B, Mt. Bullion, California. We will consider the argument concerning interference to Station KNGT from Station KFRC-FM..

9. At the outset, we concede that this allegation of interference is untimely. Gold Country did not raise any interference arguments in response to the original Notice of Proposed Rule Making and Order to Show Cause in this proceeding. In its Petition for Reconsideration directed to the First report and Order, Gold Country again did not raise any issue of interference. It was not until November 10, 1995, after the statutorily mandated period for filing a petition for reconsideration, did Gold country file a "Supplemental Pleading" that raised, for the first time, an allegation that a Channel 259A operation in Jackson would

⁴In this regard, we note that earlier in this proceeding, Gold Country did not serve Nevada County, licensee of Station KNCO, Grass Valley, California, with a copy of its Petition for Rule Making as required by Section 1.401(d) of the Rules.

receive interference from super-power Station KFRC-FM.⁵ We agree with Nevada County that these failures do not represent ordinary diligence by Gold Country in this proceeding. In this regard, Section 1.429(b) of the Rules provides that petitions for reconsideration relying upon facts not previously submitted will be granted only under three limited circumstances. First, the facts relate to events which have occurred or circumstances which have changed since the last opportunity to present these facts to the Commission. Second, the facts were unknown to the petitioner and could not have been timely ascertained through the exercise of ordinary diligence. Third, the Commission determines that consideration of these facts is required by the public interest. Notwithstanding the lack of ordinary diligence by Gold Country in raising the issue of interference, we believe that the public interest requires that we consider the allegation of significant interference to the only broadcast station licensed to Jackson, California.

10. We have done our own engineering study concerning the level of interference Station KFRC-FM would cause to a Channel 259A operation by Station KNGT in Jackson. Currently Station KNGT provides a 60 dBu service to 36,566 persons in an area of 1,726 square kilometers.⁶ In accordance with Section 73.313 of the Rules, we make this determination on the extent of the 60 dBu contour using the standard propagation methodology, the F(50,50) curves, which predicts the distance from the transmitter to a specific signal strength, such as 60 dBu, given the power and height of the antenna. In calculating interference from Station KFRC-FM, we first note that Jackson is 155 kilometers northeast of San Francisco along the 63.7° N azimuth. Co-channel interference results when the 40 dBu signal of Station KFRC-FM, using the F(50,10) curves, overlaps the 60 dBu contour of Station KNGT. See Section 73.509 of the Rules. In this instance, the Station KFRC-FM 40 dBu contour will extend 160 kilometers while the 60 dBu contour of Station KNGT extends 24.2 kilometers. This area of interference encompasses 1,107 square kilometers containing 25,138 persons. In this regard, we have also examined the Nevada County suggestion that intervening mountains would attenuate or eliminate any such interference. In doing so, we have examined the terrain profile along several radials between Jackson and San Francisco to a distance of 150 kilometers using a 3-arc-second terrain data base. Despite the high mountain range 30 to 40 kilometers east of San Francisco, our examination of the terrain shows no reason for the interference fields beyond 60 kilometers from the Station KFRC-FM transmitter site to be less than that predicted by the F(50,10) curves. The reason for this determination is the fact that beyond 60 kilometers, the dominant mode of FM signal propagation results from atmosphere reflection, referred to as troposcatter. As such, the interfering 40 dBu contour of Station KFRC-FM extends the same distance as predicted by the F(50,10) curves notwithstanding the mountain range between San Francisco and Jackson. Nevada County has provided no engineering exhibit that would refute this finding.

11. As stated earlier, the modification of the Station KNGT license to specify operation on Channel 259A will result in a loss of existing Station KNGT service to approximately 25,138 persons in an area of 1,107 square kilometers. We cannot make a finding that impairing the only broadcast station

⁵Class B Station KFRC-FM operates with an effective radiated power (ERP) of 40 kilowatts at a height above average terrain (HAAT) of 396 meters. This is the equivalent of 321 kilowatts ERP at a HAAT of 150 meters. Section 73.211 of the Rules prescribes maximum facilities for a Class B FM station of 50 kilowatts ERP at a HAAT of 150 meters. The minimum separation requirements for FM stations set forth in Section 73.207 of the Rules presumes an FM station will operate at or below maximum facilities.

⁶Station KNGT operates on Channel 232A as a three-kilowatt Class A FM facility. It does not meet the new separation requirements now set forth in Section 73.207(b) of the Rules which would permit a six-kilowatt operation. See Amendment of Part 73 of the Rules to Provide for an Additional Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations, *supra*. In view of the current three-kilowatt operation by Station KNGT, Channel 259A was substituted as a three-kilowatt allotment.

licensed to Jackson is in the public interest. For this reason, we are setting aside this modification of the Station KNGT license to specify operation on Channel 259A, and are returning Station KNGT to Channel 232A. As a result of the action returning Station KNGT to Channel 232A, it is also necessary to set aside two conflicting actions in the First Report and Order. Specifically, we are setting aside the upgrade of Station KNCO, Channel 232A, Grass Valley, California, to Channel 232B1, as well as the action allotting Channel 232A to Farmington, California. In view of these actions, we are now able to grant the remaining pending proposal in this proceeding which had been precluded by the Channel 232B1 upgrade at Grass Valley. Specifically, we are upgrading Station KNGT, Jackson, California, to specify operation on Channel 232B1.⁷ This will provide additional service to approximately 46,000 persons. In order to accommodate this upgrade at Jackson, we will modify the license of Station KNCO, Grass Valley, California, to specify operation on Channel 231A.⁸ In accordance with Circleville, Ohio, 8 FCC 2d 159 (1976), Gold Country will be required to reimburse Nevada County for its reasonable costs associated with changing its channel.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 23, 1999, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Grass Valley, California	231A, 257B1, 277A
Jackson, California	232B1
Farmington, California	-----

13. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Gold Country Communications, Inc., for Station KNCO, Channel 232A, Jackson, California, IS MODIFIED, to specify operation on Channel 232B1, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Nevada County Broadcasters, Inc., for Station KNCO, Channel 232A,

⁷The reference coordinates for Channel 232B1 at Jackson, California, are 38-24-44 and 120-35-32.

⁸The reference coordinates for the Channel 231A allotment at Grass Valley, California, are 39-14-44 and 120-57-52.

Grass Valley, California, IS MODIFIED to specify operation on Channel 231A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in the authorization for Station KNCO except for the channel as described above. Any other changes, except for those specified under Section 73.1690 of the Commission's Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Commission's Rules, PROVIDED the transmission facilities comply in all respects with the authorization for Station KNCO except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

15. IT IS FURTHER ORDERED, That the aforementioned actions contained in the First Report and Order in this proceeding allotting Channel 232A to Farmington, California, upgrading Station KNCO, Grass Valley, California to Channel 232B1, and modifying the license of Station KNKT, Jackson, California, to Channel 259A, ARE HEREBY SET ASIDE.

16. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Eric R. Hiding for a Channel 232A allotment at Farmington, California (RM-6904) IS DENIED.

17. IT IS FURTHER ORDERED, That the counterproposal filed by Nevada County Broadcasters, Inc. proposing a Channel 232B1 upgrade for Station KNCO, Grass Valley, California (RM-7415), IS DENIED.

18. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this Memorandum Opinion and Order BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Nevada County Broadcasters, Inc., 1255 E. Main Street, Grass Valley, California, 95945.

19. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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